Lady Hale gives the Munkman Lecture 2013 at BPP Law School, Leeds

What are Care Proceedings for?

5 September 2013

Thank you for inviting me back to Leeds, the city in which I was born and where I celebrated my first birthday 67 years ago. I still have fond memories of the trams as they rattled along Street Lane outside my grandparents' house in Roundhay. Thank you also for inviting me to celebrate the memory of John Munkman, who practised as a barrister in Leeds for many years until he died at an unknown age in 2001. I do not think that I ever met him, even during the few short years in which I practised as a barrister in Manchester. But I was familiar with his incredibly useful books on *Damages for Personal Injuries and Death* and *Employer's Liability*. And I can agree with what that great advocate of this circuit, Gilly Gray, wrote in his Foreword to Munkman's book on *The Technique of Advocacy*:

> "John Munkman has a laser beam eye. Sharp intellect develops and adorns the theme. He clarifies where others cloud. He distils where others dilute."

It has always been my aim, as a teacher, writer and judge, to clarify and distill rather than to cloud and dilute. But you will have to judge whether, in addressing the question "What are Care Proceedings For?" I have offered a worthy tribute to the man in whose memory it is done.

It may seem a silly question to which the answer is obvious. Surely care proceedings are there to protect children from harm? But we could simply empower social workers to do that. Care proceedings are also there to protect children and their families from the intrusive power of the

state. The freedom of families to choose their own life-styles and to bring their children up as they please is a crucial attribute of a free society. As the Review of Child Care Law put it in 1985, “it is important in a free society to maintain the rich diversity of lifestyles which is secured by permitting families a large measure of autonomy in the way in which they bring up their children” (para 2.13). In saying this we were only reflecting the understanding of all the modern human rights instruments, forged in the aftermath of World War II, with the experience of right-wing totalitarianism in the west and the rise of left wing totalitarianism in the east.

Thus Article 12 of the Universal Declaration of Human Rights of 1948: “no-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”. Article 16.3: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. These became articles 17 and 23.1 of the International Covenant on Civil and Political Rights of 1966. Meanwhile, as we all know, there had been article 8.1 of the European Convention on Human Rights of 1950: “Everyone has the right to respect for his private and family life, his home and his correspondence”. The same theme is carried through to article 18.1 of the Convention on the Rights of the Child of 1989: “Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child”; and article 9.1: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.

But it is one thing to understand the importance of this principle and quite another thing to translate it into workable legal rules and processes. I am going to concentrate on the legal rules rather than the processes. We all know that there have been some catastrophic failures in child

protection which have come to public attention over the years. These date back at least as far as the death of foster child Dennis O'Neill in that "grim farmhouse" in Shropshire in January 1945, which led directly to the modern child care system set up in 1948. They continued through Maria Colwell, Kimberley Carlisle, Victoria Climbie, Baby P and many more, culminating most recently in the horrific case of Daniel Pelka, where mother and her partner were each ordered to serve a minimum of 30 years for their "incomprehensible brutality". I do not know, but I suspect that that is the longest tariff ever set for murdering a child.

But in all of those cases, the problems were those of detection, information-sharing and decision-making. They were not problems of definition and drawing boundaries. No-one doubts that it is wrong to starve and beat a child to death, as happened both to Dennis O'Neill and Daniel Pelka. No-one doubts that the state has not only the right but the duty to step in to protect such children. That time and again we fail to do so is the result of human fallibility, for which we must all take some share of the blame. I dread to think how many mistakes I must have made as a trial judge. We rarely get to know what happened next. But mistakes there must have been. In my view, one of the essential functions of the judiciary in child protection cases is to take the risks and apply the law to protect both children and their families in a way which the professionals may not feel able to do.

So while I know that the whole family justice system, and care proceedings in particular, are going through a massive procedural upheaval at the moment, my theme today is not so much how we may improve our fact-finding, information-sharing and decision-making processes, important though that is, but how the law should define the issues and set the boundaries for compulsory state intervention. It is not enough, as the Review of Child Care Law went on to say, that "only where their children are put at unacceptable risk should it be possible compulsorily to

intervene" (para 2.13). What sorts of risk are we talking about and what level of risk is unacceptable?

If you recall the world before the Children Act 1989, there were three broad avenues to compulsory intervention. One was a parental rights resolution under the Children Act 1948, later the Child Care Act 1980. These dated back to Poor Law Acts of 1889 and 1899. These enabled the poor law guardians to assume parental rights over the pauper children in their care by resolution, initially without any legal process, in cases of parental death, desertion, imprisonment, disability or unfitness. The object was to enable the authorities to provide for the child – perhaps by sending her abroad – without the risk of her family reclaiming her once she became old enough to go out to work for them, or to rescue the child from the pernicious influences of the family; but sometimes, as we know now, with disastrous results.

Another avenue was by way of care proceedings to remove a child from her home under the Children and Young Persons Act 1969. These had two main sources. One was the Industrial Schools legislation of the 19th century, which catered for children who were falling into bad associations, exposed to moral danger or beyond parental control, children who might not yet have committed criminal offences but were seen as much as a *risk to* society as *at risk* themselves. Indeed, a Departmental Committee on Reformatory and Industrial Schools of 1913 questioned why the state should pay for the upbringing of children unless they *did* constitute some sort of risk. I wonder how much child protection work would be done if people still took that view today? The other source was the Prevention of Cruelty to and Protection of Children Act 1889, which created the offences of child ill-treatment and neglect now contained in section 1 of the Children and Young Persons Act 1933. On conviction of the parent, the court could commit the child to the care of relative or anyone else willing to have her. The 1933 Act also

brought these two strands - the naughty and the neglected or ill-treated - under one umbrella as children in need of care and protection. The requirement of a conviction as a necessary pre-condition for intervention in cases of neglect and ill-treatment was not removed until the Children and Young Persons (Amendment) Act 1952. This was as a result of a prosecution brought by the NSPCC against a blind couple for neglecting their children. The grounds for intervention under the 1969 Act, as some of you will remember, continued to reflect both of these strands (along with juvenile offenders, but that short-lived experiment is another story). In relation to child abuse and neglect they concentrated on the present: "his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated" (s 1(2)(a)). It was only possible to bring proceedings in respect of future harm if it was probable that this would happen in the future, having regard to the fact either that another child in the same household had already been harmed (s 1(2)(b)) or that a "schedule 1 offender" was or might become a member of the household (s 1(2)(bb)).

The third avenue was by way of an order committing the child to the care of a local authority in wardship or matrimonial proceedings. This was first provided for in matrimonial proceedings and extended to wardship by section 7(2) of the Family Law Reform Act 1969. The criterion was that there were "exceptional circumstances making it impracticable or undesirable for" the child to be under the care of his parents or any other individual. This was vague enough, but the Court of Appeal held that even this did not apply where the local authority was promoting a placement with foster parents. Then, according to Ormrod LJ, the decision did "turn upon what [the judge] called the 'relative merits' of the present foster parents and the mother 'in the ideal parents' stakes'" (in *Re CB (A Minor)* [1981] 1 WLR 379, 386, [1981] 1 All ER 16*)*: a recipe, as one Family Division judge has recently put it, for social engineering. Some local authorities began to

find wardship in the High Court an altogether more flexible and welcoming jurisdiction than care proceedings in the juvenile courts.

So the Review of Child Care Law was tasked with bringing some order into this confusion of processes and criteria which would achieve an acceptable balance between respect for family autonomy and protecting the child from harm. The result was the so-called "threshold criteria" in section 31(2) of the Children Act 1989, which are not identical to, but closely modelled on the Review's recommendations. The underlying rationale is "unacceptable risk of harm", but that is not what the criteria say. The contemplated harm is present or future abuse or neglect, but once again that is not what the criteria say. One of the problems, it seems to me, is that those concepts, of risk, abuse and neglect, are what dominate professional thinking, whereas we as lawyers have to operate within what the subsection actually says. As you know, it requires (1) that the child is either suffering or likely to suffer significant harm; and (2) that that harm is attributable to the care given or likely to be given to the child not being what it would be reasonable to expect a parent to give to him or to the child being beyond control.

This apparently simple formula has been before the highest court in the land on eight occasions, which is some indication of how difficult it is capture the essence of the proper balance between child protection and family autonomy in legal language.

First, of course, there is the problem of finding the facts. Loose talk about "risk" can easily lead people to act on the basis of what may have happened rather than on the basis of what has happened. This is not surprising as all of us know how difficult it is to work out where the truth lies in any particular case. A very intelligent friend of mine recently said that he couldn't see the problem of having to litigate in person because all you had to do was go and tell the court the

facts. We all know that life is not like that. Even the most well-meaning people are imperfect historians, putting their own interpretation upon their inevitably partial recollections of past events. And of course many witnesses are not at all well-meaning. The court has to fall back, not on truth, but on proof. As Lord Hoffmann put it in *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 4 All ER 1, para 2:

> "If a legal rule requires a fact to be proved (a fact in issue) a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The act either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, the value of zero is returned and the fact is treated as not having happened. If he does discharge it, the value of one is returned and the fact is treated as having happened."

That same Family Division judge has commented that "most non-lawyers would struggle with Lord Hoffmann's approach (and we should recognise this)". But we still have to do it.

Next to proof comes the standard of proof. For many years, care proceedings were bedevilled by what I think was a misunderstanding of Lord Nicholls' approach in *Re H (minors) (sexual abuse: standard of proof)* [1996] AC 563, [1996] 1 All ER 1 – that somehow a higher standard of proof applied the more serious the allegation or the more serious the consequences of finding it proved. I myself find it easy to understand the balance of probabilities standard – is it more likely than not that it happened? – and the beyond reasonable doubt standard – am I sure that it happened? I find it very difficult to understand something in between them – say a 75% likelihood that it

happened – or how I decide whether 70% is good enough for the particular allegation in question. At least in *Re B* we were able to hold that there is only one standard – the balance of probabilities – when finding facts in care proceedings. The principled justification for the difference between care and criminal proceedings is the equal seriousness for the child of getting it wrong in either direction – finding that it did happen when it did not or finding that it did not happen when it did. Traditionalists like me still think that the seriousness of finding an innocent person guilty is greater than the seriousness of finding a guilty person innocent.

Next to proof of facts comes proof of predictions. This is where the Children Act has made our lives much harder. Under the CYPA you still had the prediction problem but only in two proven factual situations – harm to another child in the same household or harm to another child perpetrated by a member of the same household. In *Re H*, the House of Lords was divided on whether predictions of future harm had to be based on firm findings of past or present fact. On the one hand, Lord Nicholls, for the majority, held that suspicion was not enough. Just as a finding of present harm had to be based on facts, so had a finding of future harm. He pointed out that if a suspicion of past harm was enough to found a likelihood of future harm there was no real need for the first limb of the first condition at all. He also pointed to the difference between the criteria for preliminary orders, based on "reasonable grounds to suspect" or "to believe" and those for final orders, which had to be proved to the court's satisfaction.

Lord Browne-Wilkinson took a different view: "the combined effect of a number of factors which suggest that a state of affairs, though not proved to exist, may well exist is the normal basis for the assessment of future risk" (at p 572). Five unconfirmed sightings of what might be enemy bombers were enough to conclude that there was a risk, a real possibility, of an enemy air-raid. Similarly, Lord Lloyd: "The finding of future risk must, of course, be based on

evidence. . . . But if there is such evidence, then a finding may be made, even though the same evidence is insufficient to support a finding of past fact" (at p 580). These are great minds and their views are worthy of great respect. As Lord Hoffmann commented in *Re B*, at para 3:

> "The majority of the House rejected the analogy with facts which merely form part of the material from which a fact in issue may be inferred, which need not each be proved to have happened. There is of course no conceptual reason for rejecting this analogy, which in the context of some predictions (such as Lord Browne-Wilkinson's example of air raid warnings) might be prudent and appropriate. But the House decided that it was inappropriate for the purposes of section 31(2)(a). It is this rule which the House reaffirms today."

There may not have been any conceptual reasons for rejecting the analogy, but as Lord Nicholls had shown there were good reasons of policy and statutory construction for doing so. The House of Lords and Supreme Court have since been unanimous in adhering to the majority view. I wonder once more whether one's approach is coloured by whether one uses the word "risk", as both the dissenters did, or the word "likely" which is in the statute? Lord Lloyd went so far as to say that "Parliament has asked a simple question. Is the court satisfied that there is a serious risk of significant harm in the future?" (at 581). But that is not what Parliament said.

This leads on, of course, to the first burning question of the year: does this same approach apply where the disputed fact from which the likelihood of harm is to be inferred is, not whether or not a child has been harmed in the past, but whether or not a particular person was responsible? It is always so tempting, for any judge, to find the only facts that you need to find in order to decide the case and refrain from going further. I well remember a Liverpool case in which all I had to

find was that the baby's multiple injuries were non-accidental and that the parents were responsible. I did not have to express a view about the crimes of which they might have been guilty. That was the business of the criminal courts, so I was a bit puzzled when the criminal judge told me that no-one had suggested that I was wrong not to brand them murderers. I did not do so because there was no need for me to do so. So judges in care proceedings are tempted not to decide which of the child's parents or carers was the perpetrator of the injuries. It will usually make no difference to the result of the case in front of them.

But of course it may well make a difference to the result in a case about another child if the family circumstances have changed. The point first came before us in *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678, [2010] 1 All ER 705. The main point was that the judge had applied the wrong standard of proof when deciding that she could not rule out the mother as perpetrator, while later confessing that she thought it 60% likely that it was the father. So we sent it back to be tried again (although I don't think the eventual result was any different). No-one questioned the views which both Lord Hoffmann and I had expressed in *Re B* that, once it was established that a child's injuries were non-accidental, any question of inherent improbability went out of the window. The standard for identifying the perpetrator was the simple balance of probabilities (paras 15 and 73).

The headnote in the law reports is, I think, a little misleading about the duty of the judge in such cases. We did say that if the judge found it difficult to decide, even on the balance of probabilities, there was no obligation to do so (para 35). But we also approved Wall LJ's statement in *Re D (Care Proceedings: Preliminary Hearings)* [2009] 2 FLR 668, para 12, that if an individual perpetrator can properly be identified it is the judge's duty to do so. And we went on to point out the advantages of doing so, in clarifying risks and the strategies to prevent them,

working with the family, and helping the child make sense of her history (paras 36 – 38). If this could not be done, the judge should still identify the possible pool of perpetrators, using the "real possibility" standard adopted in *North Yorkshire County Council v SA* [2003] 2 FLR 849, rather than the "no possibility" test applied by the judge in that case (para 43).

S-B was an unusual case: a one-off incident of bruising to a young baby's face and arms, serious of course but not of the same level of magnitude as some of the injuries we see; the judge had concluded that only one parent was responsible; and the injuries were such that the other parent could not be blamed for failure to protect. The parents had since separated. So what about the new baby, who had suffered no harm at all? Could it be concluded that he was likely to suffer significant harm in the future just because his older brother had done so? How could one say that this was even a possibility unless one could conclude that it was more likely than not that the mother had injured the older child? We concluded (in para 49) that one could not. *Re H* had established (and *Re O (Minors) (Care: Preliminary Hearing)* [2003] UKHL 18, [2004] 1 AC 523, [2003] 2 All ER 305 confirmed), that a prediction of future harm has to be based upon findings of actual fact. Only once those facts had been found did the degree of likelihood become the real possibility test adopted in *Re H*.

I sometimes wonder whether the judgments which I write, even when they are the collegiate judgments of a court consisting of seven justices, as *Re S-B* was, command less authority than those written by my colleagues. It took until *Re B* in 2008 for a serious challenge to be mounted to the majority view in *Re H* in 1996. But we were told that the infamous paragraph 49 in *Re S-B* had caused such consternation in professional circles that the point had swiftly to be returned to us in *Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9, [2013] 1 AC 680, [2013] 3 All ER 1. The case was set up for the purpose, if not at the initiative of the local

authority, then certainly with their support. The Court of Appeal departed from their usual practice and, having decided it as the judge had done in accordance with *Re S-B,* themselves gave permission to appeal to the Supreme Court.

This was a very different case from *Re S-B*: a three week old baby had died as a result of asphyxia, following multiple injuries inflicted on more than one occasion; the injuries could have been caused by mother or father or both, but the judge did not say which; and there were all sorts of indications, perhaps of complicity, but certainly of failure to protect, on the part of a non-perpetrating parent. The judge commented that "singling out a likely perpetrator does not help this couple because it must be debateable as to which is worse, to inflict this injury or to protect the person responsible." So their second child was taken away from them. But the mother was now in a completely different relationship, had been living for some time with a father and his two children from a previous relationship, giving no cause for concern to the authorities at all until her third child was 20 months old, when the local authority found out about the earlier proceedings and required the mother to leave home.

The local authority brought proceedings in respect of all three children. They were content to rest their case for the likelihood of future harm, not on all the other questionable features of the mother's behaviour in the earlier case, but solely on the fact that she had not been ruled out as perpetrator of that child's injuries. I do wonder what to make of this; also of the fact that when the trial judge loyally followed *Re S-B,* dismissing the care proceedings and allowing the mother to go home, the appeal was not progressed as a matter of urgency; and that no proceedings were brought in respect of a new baby, conceived before she left home and born shortly after she returned. I cannot escape the suspicion that no-one seriously thought it likely that the new baby would be harmed.

Be that as it may, the Supreme Court unanimously upheld the previous decisions and dismissed the appeal. The only disagreement was between the majority, who thought that the fact that another child had been seriously harmed in the same household as the mother was relevant but not sufficient to establish a likelihood of future harm, and Lord Wilson and Lord Sumption, who thought that it was not even relevant. As Lord Wilson vividly put it, "if X's consignment to a pool [of possible perpetrators] has a value of zero on its own, it can, for this purpose, have no greater value in company" (para 80). But I doubt whether there was really much difference, at least between him and me. I only thought it relevant to the extent that there were other facts and circumstances related to the fact that a child had been injured which were indicative of a likelihood of harm to another child in a completely different household – as indeed there might have been in this case (paras 52-53).

I know that the decision has been subject to severe criticism, not least by Stephen Gilmore in the Child and Family Law Quarterly (see (2013) 25 CFLQ 215) who has also written to The Times to suggest that the Act should be amended to reverse the decision. That is a matter for Parliament. But I do disagree with the suggestion that our decision is inconsistent with the earlier House of Lords' decisions. It is entirely consistent with *Re H*, which was all about how you prove a likelihood of future harm. The other two cases were not about that at all. *Lancashire County Council v B* [2000] 2 AC 147, [2000] 2 All ER 97, was about a child who had already been seriously harmed. The question was whether the harm was attributable to a lack of reasonable parental care when the judge could not decide whether the mother, the father or the child-minder were responsible. The answer was that that condition is fulfilled if either a parent or a person with whom the parents shared care was responsible, even if that means taking a child away from a parent who may have done no wrong. *Re O (Minors) (Care Proceedings:*

Preliminary Hearing) [2003] UKHL 18, [2004] I AC 523, [2003] 2 All ER 305, was about the welfare stage of the enquiry, after the threshold has been crossed: how do you decide what to do if you know that a child has been harmed but you do not know which parent was responsible? Lord Nicholls re-iterated that in considering the likelihood of future harm the court could act only on the basis of proven facts (para 17). He also concluded, albeit obiter, that unproven allegations of past harm could not be taken into account at the welfare stage (para 38). But once the threshold had been crossed, the court could take into account the inclusion of a parent in a pool of possible perpetrators: it would be "grotesque" to proceed on the basis that the child was at risk from neither parent, even though one of them must have done it (para 27).

I have no quarrel with that. It only serves to underline the importance of deciding who the perpetrator was in any case where you can conscientiously do that on the evidence before you, because then it will be so much easier to decide the later questions. But my own view is and remains that those are very different questions – how to protect a child who has already been harmed - from the question of whether it has been proved likely that a child who has not been harmed will suffer harm in the future. (It is interesting that there was no discussion in *Re O* of the basis upon which the threshold had been crossed in relation to the children who had not been harmed.) The job of any judge who is doing something as serious as taking a child away from her family, perhaps forever, is carefully to apply the words of the relevant statute. It is not enough to use different and more slippery words, such as "risk", to justify your intervention.

Perhaps it is because I go back to the days of the Children and Young Persons Act 1969: you will recall that there were two grounds relating to future harm, one of which was that it was probable that this child would be harmed "having regard to the fact" that a court had found that another child in the same household had been harmed. I don't think that ground would have applied in *Re*

J, because the household into which the new child had been born was quite different from the household in which the other child had died. But it might have applied in *Re S-B*, because you could say that the household was the same even though the father had left. But under the 1969 Act the court still had to find that harm to this child was probable having regard to that fact – it did not follow as night the day that it was.

Note that the 1969 Act used the word "probable" rather than "likely". I know of no case law, but I think it probable that the High Court would have found that "probable" meant more likely than not, whereas we all know that "likely" in the Children Act does not mean that. It was decided in *Re H* that it means no more than a real possibility, "a possibility which cannot sensibly be ignored, having regard to the nature and gravity of the feared harm in the particular case" (DN All ER 15). Lord Nicholls reasoned that the child needed protecting from such a possibility just as much as from a probability and also that from the parents' point of view there was no particular magic in the difference between the two. Some might wonder how he could reconcile this view with his rejection of the real possibility that allegations of past facts might be true. Doesn't the child also need protection against that? I think the difference must be that without a firm foundation in fact you cannot decide that there is any possibility at all and both children and parents need protection against intervention based on mere suspicion. I also think it very difficult to decide whether something is more likely than not to happen in the future, whereas it is rather easier to decide whether it is more likely than not that it happened in the past.

The other point is that Lord Nicholls' formula relates the required degree of likelihood to the magnitude of the harm which is feared. Thus a comparatively lower degree of likelihood will justify intervening to protect a child from death or serious injury than would justify intervening to protect a child from less serious harm. The Supreme Court had said as much in *Re S-B* (at para

9) and on that point, at least, I think we were agreed in the most recent case of *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911.

Re B is a difficult case for me to talk about, because it is the first time since *Re H* that the Law Lords have disagreed with one another about the result in a child protection case. I won't say anything about the facts, because reading the two judgments which purport to give a full account is a vivid illustration of how different judges can tell the same story in a very different way. I would like to think that our disagreement was only about the role of an appellate court in cases where rights under the European Convention are involved. But I have a sneaking feeling that it was about rather more than that. It was fundamentally about what we mean by significant harm. How do we distinguish between emotional and psychological harm to a child and the likely consequences of being brought up by less than perfect parents? As I put it, at para 143,

> "We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the state does not and cannot take away the children of all the people who commit crimes, who abuse alcohol, who suffer from physical or mental illnesses or disabilities, or who espouse anti-social political or religious beliefs."

We should of course protect the children of parents who neglect or ill-treat them because of such characteristics: one only has to read *Mind the Child* by Camila Batmanghelidjh and Kids' Company (Penguin Books, 2013) to be outraged at the lives some of these children lead and at the failure of the authorities to do anything about it. But that is very different from simply having less than perfect people as parents. Hedley J famously put it, to universal approval, in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, at para 50. First he quoted Lord Templeman's

well-known words in *Re KD (a minor ward) (termination of access)* [1988] 1 AC 806, at page 812:

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature."

Then he went on:

> “There are those who may regard that last sentence as controversial but undoubtedly it represents the present state of the law in determining the starting point. It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, whilst others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting. In any event, it simply could not be done.”

In that case, there was little doubt that the children would do much better at school and perhaps in other ways, if they were brought up by foster parents rather than by their own parents, who had quite significant learning difficulties and some history of domestic violence. But the judge held that the threshold had not been crossed. So how *do* we distinguish between the natural

tendency of children to grow up to be like their parents and “significant harm” for the purpose of the threshold?

I am not sure that we were able to give any very satisfactory answer to that question. The other Justices were reluctant to address it. I thought it important that, when addressing the threshold, the judge should identify as precisely as possible the nature of the harm which the child was suffering or likely to suffer, particularly where this was future impairment of psychological or social development. I also thought that the Departmental Guidance was correct to define “significant” as “considerable, noteworthy or important”. Again, the court should identify why and in what respects the likely harm was significant. Further, the harm has to be attributable to a lack or likely lack of reasonable parental care, and not just to the characters and personalities of the parents. So it would help if the judge were to spell out in what respects it was likely that parental care would fall short of what it was reasonable to expect. Finally, the court should consider the relationship between the degree of likelihood and the nature and severity of the harm (para 193). This all seems to me to be a useful discipline and one which would deter too ready a finding that the threshold has been crossed on the basis of an unquantified risk of not very substantial psychological harm way in the future.

But the trial judge had found the threshold crossed and none of us felt able to interfere with that judgment. We all agreed that it was rightly characterised as a value judgment based on the facts found, rather than an exercise of discretion, with which an appellate judge could only interfere if he had got it wrong.

The other issue was the proportionality of making a care order with a view to the permanent removal of a child from devoted parents who were well able to look after her immediate needs

and with whom she already had a good relationship. Lewison LJ had been troubled by the proportionality of planning this most drastic interference with family life where the threshold had not been crossed in such an extreme way. But we were agreed that proportionality was not to be seen in such a linear fashion. The most drastic order was to be reserved for cases where, as I put it and other agreed, nothing else would do (para 197); or as Strasbourg has put it, "only when motivated by an overriding requirement pertaining to the child's best interests" (mostly recently in *R and H v United Kingdom* (2011) 54 EHRR 28, para 81). But there was no necessary correlation between the severity of the harm and whether something else would do: I have known cases where the feared harm has been very severe but the professionals have been able to work successfully with the family. By contrast, this was a case in which the judge had decided that the professionals would not be able to work successfully with the family, and the majority did not feel able to conclude that he was wrong to make a care order as a result. Three of the Justices, Lord Neuberger, Lord Clarke and Lord Wilson, agreed that there was no difference between the appellate function of review where human rights were engaged and the appellate function in other cases. Two of us, Lord Kerr and I, thought that it was the court's duty to make its own assessment (although we disagreed in the result).

It will be interesting to see whether that debate resurfaces in relation to other cases where human rights are engaged. I seem to recall cases where the appellate courts have had little difficulty in re-assessing the proportionality of interferences with convention rights whether perpetrated by public authorities or by lower courts and tribunals: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 might have been just such a case had the Secretary of State not conceded to us that it would be disproportionate to deport the mother, whose British children would then *de facto* be deported too. Perhaps more importantly in this

context, I do worry about the relevance of proportionality to whether the threshold has been crossed. It is, of course, the making of the order which interferes with the right to respect for family life. But the reasons for the interference have to be "relevant and sufficient" so as to make the interference "necessary in a democratic society" and these include the reasons why the threshold was crossed. The majority, however, seem to have thought proportionality irrelevant at that stage.

Enough of these legalistic musings. I am sure that we all want care proceedings to do both of the tasks with which I started out: to protect children from significant harm and to protect both children and their families from unwarranted interference. Some of you may wonder whether they can continue properly to protect families in the brave new world of strict time-tables, robust case management and single joint experts on almost everything. Counsel commented in *Re B* that such cases would not happen again – with two experts on the mother's mental health, and two assessments of the parenting capacities of the parents, as well as the usual factual and social work evidence and the guardian's enquiries. One well-known journalist who has strong views on the subject of care proceedings brought on the basis of future psychological harm might comment that the whole system would be better off not pursuing such cases at all, but being far more vigilant and persistent to protect the Daniel Pelkas of this world.

I think that we can continue to perform both functions in the brave new world. But it will require clear law, clear thinking about how the evidence fits the legal criteria, and, dare I say it, the courage to make the decisions which the professionals cannot dare to make. As the court said in *Re S-B*, "we should no more expect every case which a local authority brings to court to result in an order than we should expect every prosecution brought by the CPS to result in a conviction" (para 19). If the courts become little more than a rubber stamp, then where will our freedom be?